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*Movant and Prior Lead Counsel*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

IN RE STEC, INC. SECURITIES  
LITIGATION

SACV09-1304-JVS (MLGx)

**DECLARATION OF BLAIR A.  
NICHOLAS IN SUPPORT OF  
MOTION FOR APPROVAL OF  
ATTORNEYS' FEES AND  
LITIGATION EXPENSES**

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1 I, Blair A. Nicholas, do hereby state, under the penalty of perjury, as  
2 follows:

3 1. I am a partner of the law firm of Bernstein Litowitz Berger &  
4 Grossmann LLP (“Bernstein Litowitz”), which initially served in this case as  
5 Court-appointed co-lead counsel for the Class, and subsequently served as counsel  
6 for Class member West Virginia Laborers’ Pension Trust Fund (“West Virginia  
7 Laborers”) in its California state court putative class action, which preserved and  
8 prosecuted Class Members’ Securities Act claims (the “Securities Act Case”).<sup>1</sup> I  
9 have personal knowledge of all material matters related to the Litigation based  
10 upon my active supervision and participation in the prosecution of this Litigation  
11 since its inception. If called upon to do so, I could and would testify to the matters  
12 set forth herein.

13 2. This declaration is submitted pursuant to Federal Rule of Civil  
14 Procedure 23(g) to assist the Court in evaluating Bernstein Litowitz’s application  
15 for an award of attorneys’ fees and reimbursement of litigation expenses.

16 3. Bernstein Litowitz received no compensation during the course of  
17 more than three years prosecuting two complex class actions, one in federal court  
18 and one in state court, which contributed to the benefit obtained by the Class.  
19 During this time, Bernstein Litowitz invested over 4,407 hours for a total lodestar  
20 of \$2,152,742.50, and advanced reasonable and necessary expenses of \$72,346.85  
21 in prosecuting the claims.

22 **I. HISTORY OF THE FEDERAL AND STATE COURT ACTIONS**

23 4. A summary of the history of the actions is provided below. In  
24 addition, Bernstein Litowitz respectfully refers this Court to its lodestar time  
25 records being submitted *in camera* for detailed descriptions of the work performed  
26

27  
28 <sup>1</sup> All capitalized terms that are not defined herein are defined in the Stipulation and  
Agreement of Settlement filed on October 5, 2012 (ECF No. 328-1).

1 by Bernstein Litowitz for the benefit of the Class.

2 **A. Prior Co-Lead Counsel**

3 5. Beginning on November 6, 2009, several complaints were filed in this  
4 Court against STEC and other defendants alleging violations of the Securities Act  
5 and Exchange Act. By Order dated February 8, 2010, the Court granted the motion  
6 for appointment of Arman Rashtchi and Keith Ovitt as lead plaintiffs, and their  
7 selection of Bernstein Litowitz and Kahn Swick & Foti, LLC, as co-lead counsel.  
8 ECF No. 61. As the Court-appointed co-lead counsel, Bernstein Litowitz utilized  
9 its skill and experience as a top securities class action law firm in conducting an  
10 extensive investigation, preparing the comprehensive first consolidated complaint,  
11 negotiating and appearing before the Court regarding an appropriate pretrial  
12 schedule, and defending against Defendants' motion to dismiss.

13 6. Bernstein Litowitz understood that it was necessary that the  
14 consolidated complaint allege false statements and omissions with sufficient  
15 particularity, and that the pleading create a strong inference of scienter, such that  
16 the complaint would satisfy the PSLRA's heightened pleading standard, as well as  
17 the Supreme Court's decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551  
18 U.S. 308 (2007). In order to meet this standard, Bernstein Litowitz conducted an  
19 extensive investigation, including by reviewing and analyzing all relevant news,  
20 press releases and filings made with the U.S. Securities and Exchange Commission  
21 (the "SEC"), as well as analyst reports from over twenty analyst companies.  
22 Specifically to satisfy – and exceed – the standards for pleading falsity and  
23 scienter, Bernstein Litowitz identified over 616 potential confidential witnesses  
24 from 13 different companies, contacted over 200 of them for use in preparing the  
25 consolidated complaint, and drafted over 100 confidential investigation  
26 memoranda regarding communications with the potential confidential witnesses.

27 7. In addition, Bernstein Litowitz worked with an accounting expert to  
28 analyze the accounting misstatements and numerous violations of generally

1 accepted accounting principles (“GAAP”) detailed in the consolidated complaint.  
2 Bernstein Litowitz understood that loss causation must be pled sufficiently to  
3 satisfy the Supreme Court’s decision in *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336  
4 (2005) (“*Dura*”), and worked with an expert to ensure that the standard was  
5 satisfied.

6 8. Unquestionably, the consolidated complaint filed by Bernstein  
7 Litowitz, as co-lead counsel, contained much more extensive detail than the sparse  
8 allegations contained in the initial complaints filed at the commencement of the  
9 litigation. For example, unlike the initial complaints, the consolidated complaint  
10 detailed material misstatements and omissions regarding: (i) revenues from  
11 ZeusIOPS (“Zeus”); (ii) the \$120 million supply agreement with EMC Corporation  
12 (“EMC”); (iii) customer base and future growth; (iv) product quality; (v)  
13 competition; and (vi) internal controls and compliance with GAAP and SEC  
14 regulations.

15 9. Based on Bernstein Litowitz’s investigation, including  
16 communications with 13 well-placed confidential witnesses, the consolidated  
17 complaint alleged details regarding Defendants’ corrupt business practices,  
18 including (i) “shipping bricks” (*i.e.*, STEC’s practice of shipping empty packages  
19 or packages containing the wrong product, allowing STEC to immediately record  
20 revenue for product that was not actually shipped); (ii) forcing customers to accept  
21 inventory by a fiscal quarter’s deadline regardless of actual need for STEC’s  
22 products at that time; (iii) shipping defective or untested product; (iv) selling  
23 product as “new” even though it contained refurbished or rejected parts; (v) lying  
24 to customers about product quality, features, certifications, testing, and failure  
25 rates; (vi) altering error reports before sending them to customers; and (vii)  
26 manipulating accounting for revenue from the EMC contract in violation of GAAP.  
27 Consolidated Complaint, ¶¶22, 37-75, 186-200 (ECF No. 83).

28 10. Because Bernstein Litowitz’s investigation for the consolidated

1 complaint, including communications with confidential witnesses made pursuant to  
2 an express agreement with such confidential witnesses not to disclose their  
3 identities absent Court order, is protected work product, Bernstein Litowitz was  
4 unable to share the investigative work product with Successor Lead Counsel  
5 without potentially waiving the work product protection and violating its  
6 agreements with the confidential witnesses.

7 11. Bernstein Litowitz's consolidated complaint also detailed the massive  
8 insider trading – which was the basis of the SEC's formal investigation and  
9 subsequent civil enforcement action against Manouch Moshayedi – and explained  
10 how multiple partial disclosures, beginning on September 17, 2009, and  
11 concluding on February 23, 2010, revealed that STEC's purported increased  
12 revenue was derived from a single customer, in a one-time deal that, contrary to  
13 Defendants' misrepresentations, was not indicative of continuing demand for  
14 STEC's products.

15 12. As prior co-lead counsel, Bernstein Litowitz also met and conferred  
16 and prepared a stipulation with defense counsel regarding scheduling matters;  
17 drafted and negotiated a Joint Rule 26(f) Report (ECF No. 82), including, *inter*  
18 *alia*, a summary of legal issues, anticipated motions, discovery, and the parties'  
19 proposed pretrial schedule; participated as lead counsel in the Court's  
20 April 12, 2010 Scheduling Conference; and drafted and negotiated a stipulation  
21 and proposed order regarding pretrial deadlines. Bernstein Litowitz also prepared  
22 a comprehensive response to Defendants' motion to dismiss and request for  
23 judicial notice, explaining, *inter alia*, how the consolidated complaint sufficiently  
24 alleged Defendants' false and misleading statements and omissions with  
25 particularity; that it adequately alleged scienter, including allegations of  
26 Defendants' deliberate GAAP violations and additional supporting information  
27 obtained from well-placed confidential witnesses interviewed by Bernstein  
28 Litowitz; and how the consolidated complaint adequately alleged loss causation

1 under *Dura*. ECF No. 92.

2 13. Defendants' motion to dismiss was removed from the Court's calendar  
3 when a new lead plaintiff and lead counsel were appointed. The substitution of  
4 State of New Jersey, Department of Treasury, Division of Investment ("New  
5 Jersey" or "Lead Plaintiff") and Labaton Sucharow LLP and Lite DePalma  
6 Greenberg, LLC ("Successor Lead Counsel") as the Court-appointed Lead Plaintiff  
7 and Successor Lead Counsel became final on September 14, 2010, when the Ninth  
8 Circuit denied the petition for writ of mandamus filed by Messrs. Rashtchi and  
9 Ovitt. ECF No. 144.

10 **B. Background Of The Securities Act Case**

11 14. After the new lead plaintiff appointment became final, Bernstein  
12 Litowitz became aware of the Court's June 17, 2011 Order (ECF No. 200), which  
13 sustained the Exchange Act claims and dismissed without prejudice the Securities  
14 Act claims for lack of standing to pursue the claims as alleged in the complaint  
15 filed by Successor Lead Counsel. Although the Securities Act claims were  
16 dismissed without prejudice, Successor Lead Counsel elected not to amend the  
17 complaint to reassert the Securities Act claims. *See* ECF No. 201 (stipulating to  
18 extension of time for Defendants' to answer the prior complaint).

19 15. Having carefully reviewed the Court's June 17, 2011 Order, Bernstein  
20 Litowitz understood that the Securities Act claims were extremely valuable  
21 because Securities Act claims do not require proof of scienter, reliance or loss  
22 causation. Bernstein Litowitz further understood that Successor Lead Counsel's  
23 decision not to amend the complaint left the Securities Act claims in jeopardy of  
24 being extinguished by the statute of limitations within a matter of months.  
25 Bernstein Litowitz was thus retained by a sophisticated institutional investor, West  
26 Virginia Laborers, who is a Class Member in this case and who purchased STEC  
27 common stock in the August 2009 offering, to pursue the Securities Act claims in  
28 California state court.



1           16. Bernstein Litowitz preserved the Securities Act claims by filing a  
2 detailed complaint (the “Securities Act Complaint”) on July 1, 2011 in the Superior  
3 Court of the State of California, County of Orange against Defendants STEC,  
4 Manouch Moshayedi (STEC’s Chief Executive Officer, Chairman of the Board,  
5 and Co-Founder), Mark Moshayedi (STEC’s Chief Operating Officer), Raymond  
6 D. Cook (STEC’s Chief Financial Officer and Principal Accounting Officer), Rajat  
7 Bahri (a Director and Chairman of the Audit Committee of STEC’s Board of  
8 Directors), Barclays Capital Inc., Deutsche Bank Securities, Inc., J.P. Morgan  
9 Securities, Inc., and Oppenheimer & Co., Inc.<sup>2</sup> On July 13, 2011, the case was  
10 assigned to Superior Court Judge Gail A. Andler.

11           17. The Securities Act Complaint was brought on behalf of West Virginia  
12 Laborers and a putative class of all persons or entities who purchased or otherwise  
13 acquired the common stock of STEC pursuant or traceable to a secondary offering  
14 of STEC common stock on or about August 11, 2009 (the “August 2009  
15 Offering”), and who were damaged thereby. The Securities Act Complaint asserts  
16 claims under Sections 11, 12(a)(2) and 15 of the Securities Act, arising out of  
17 materially false and misleading statements in STEC’s Registration Statement,  
18 Prospectus, and Amended or Supplemental Prospectus for the August 2009  
19 Offering (collectively, the “Offering Documents”).

20           18. Specifically, the Securities Act Complaint alleges that the Offering  
21 Documents contained false and misleading statements and omissions, including  
22 that: (i) STEC would experience continued growth in sales of STEC’s flagship  
23 product, Zeus, to EMC similar to a massive contract announced just prior to  
24 announcing the August 2009 Offering, while omitting the material fact that the  
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26 <sup>2</sup> STEC, Manouch Moshayedi, Mehrdad Moshayedi, Raymond D. Cook and Rajat  
27 Bahri are collectively referred to as the “STEC Defendants.” Barclays Capital Inc.,  
28 Deutsche Bank Securities, Inc., J.P. Morgan Securities, Inc. and Oppenheimer &  
Co., Inc. are collectively referred to as the “Underwriter Defendants.”



1 prior contract was merely a “one-off type of deal” which would not be repeated;  
2 (ii) STEC would experience continued growth in its sales of Zeus to other original  
3 equipment manufacturer customers, while omitting, among other material  
4 information, that IBM would not begin purchasing for volume production during  
5 the second half of 2009 and was not marketing Zeus as a standard feature in its  
6 systems; and (iii) there was and would be no competition for STEC’s solid-state  
7 drivers in the foreseeable future, while omitting the material fact that new  
8 competition would be entering the market at the end of 2009 and beginning of  
9 2010. The Securities Act Complaint also alleges STEC’s second quarter 2009  
10 Form 10-Q, which was incorporated in the Offering Documents and filed with the  
11 SEC the same day as the Registration Statement, falsely reported artificially  
12 inflated revenue in violation of GAAP. The Securities Act Complaint further  
13 alleges that the falsity of Defendants’ statements began to be revealed through a  
14 series of partial disclosures on September 17, 2009, through February 23, 2010.  
15 Although, as explained below, Defendants filed a demurrer as to timeliness (to  
16 which Bernstein Litowitz filed an opposition), Defendants did not dispute that the  
17 Securities Act claims were sufficiently alleged.

18 **C. Removal Of The Securities Act Case To Federal Court**

19 19. On August 4, 2011, the STEC Defendants removed the state court  
20 action to this Court pursuant to 28 U.S.C. § 1441(b).<sup>3</sup> Following an August 5, 2011  
21 meet and confer telephone conference of counsel, West Virginia Laborers moved to  
22 remand the case back to the Orange County Superior Court on August 17, 2011,  
23 arguing that the plain language of the Securities Litigation Uniform Standards Act  
24 of 1998 does not allow a defendant to remove a Securities Act claim to federal  
25 court. On August 29, 2011, Defendants filed an opposition brief and, on  
26

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27 <sup>3</sup> The Underwriter Defendants concurred in the STEC Defendants Notice of  
28 Removal.

1 September 2, 2011, West Virginia Laborers filed a reply brief. Following a  
2 September 19, 2011 hearing, this Court granted West Virginia Laborers' remand  
3 motion on October 13, 2011, finding Defendants' removal was "not proper."

4 **D. Notice Of Related Cases, Demurrer**  
5 **And Motion To Stay The Securities Act Case**

6 20. Following remand to state court, Defendants filed a Notice of Related  
7 Cases on October 19, 2011 seeking to have the Securities Act case related to a case  
8 brought derivatively on behalf of STEC against its directors and executive officers.  
9 On October 24, 2011, West Virginia Laborers filed an opposition, arguing that the  
10 federal court action is based on different claims, has different parties, and is subject  
11 to different discovery than the state court action.

12 21. Then, following an October 27, 2011 meet and confer telephone  
13 conference of counsel, Defendants filed a demurrer to the Securities Act Complaint  
14 and a motion to stay on November 16, 2011. On December 16, 2011, West  
15 Virginia Laborers filed an opposition to defendants' demurrer, arguing that the  
16 Securities Act Complaint was timely filed under *American Pipe & Constr. Co. v.*  
17 *Utah*, 414 U.S. 538 (1974), because multiple complaints tolled the statute of  
18 limitations for the Securities Act claims asserted for all putative class members,  
19 including West Virginia Laborers. West Virginia Laborers also filed an opposition  
20 to Defendants' motion to stay on December 16, 2011, arguing that there are critical  
21 differences between the federal court action and the state court action.

22 22. On February 16, 2012, the state court held a Case Management  
23 Conference and heard oral argument on Defendants' Notice of Related Cases,  
24 demurrer and motion to stay. On February 17, 2012, the state court granted  
25 Defendants' motion to stay but declined to rule on Defendants' demurrer and  
26 Notice of Related Cases. Specifically, the state court found that "this action should  
27 be stayed pending resolution of the consolidated federal action." The State Court  
28 also directed the parties to engage in certain agreed-upon informal discovery;

1 specifically noting that “Defendants have agreed to continue to provide informal  
2 discovery to Plaintiffs notwithstanding any stay, in order to minimize the risk of a  
3 duplication of efforts between the state and federal actions.”

4 **E. Motion To Lift The Stay Of The Securities Act Case**

5 23. On September 19, 2012, West Virginia Laborers moved the state court  
6 for an order lifting the February 17, 2012 stay. West Virginia Laborers argued that  
7 the rationale for the stay had become moot due to intervening developments in the  
8 federal action, such as (i) this Court’s March 7, 2012 order refusing to certify a  
9 class in the federal action that includes the Securities Act claims because there was  
10 no representative plaintiff in the federal action with standing to maintain those  
11 claims; (ii) this Court’s June 19, 2012 order granting class certification for  
12 purposes of asserting Exchange Act claims, only; and (iii) STEC’s August 7, 2012  
13 announcement that there was a contemplated settlement of the federal action  
14 despite the absence of a representative plaintiff with standing to maintain any  
15 Securities Act claims. West Virginia Laborers argued that the potential for  
16 inconsistent rulings and unseemly conflict was no longer a concern due to these  
17 developments. On September 26, 2012, Defendants filed an opposition to West  
18 Virginia Laborers’ motion to lift the stay, and on October 3, 2012, West Virginia  
19 filed a reply.

20 24. On October 18, 2012, the state court held a Case Management  
21 Conference and a hearing on West Virginia Laborers’ motion to lift the stay and,  
22 later that day, issued a Minute Order denying without prejudice West Virginia  
23 Laborers’ motion. The state court indicated it would consider a motion for a partial  
24 lifting of the stay to pursue limited discovery and proposed that counsel for West  
25 Virginia Laborers “talk[] to opposing counsel and say[], rather than it being an all  
26 or nothing, we’re concerned about this item of evidence or this particular witness’  
27 testimony, or the third party discovery; and, how about if we just go ahead and take  
28 some testimony to preserve it, or exchange some documents so that we know what

1 we have here? As opposed to being all or nothing, full on, let's start the discovery,  
2 and all of the cost and all of the resource implications for that." The Court further  
3 advised: "Maybe we don't need a cleaver; maybe with a scalpel you can take out  
4 some witnesses or some documents or some issues that you are really concerned  
5 about, and address that issue of prejudice."

6 **F. Discovery From Defendants And Non-Parties**

7 25. On October 26, 2011, West Virginia Laborers served document  
8 requests on all Defendants seeking eight categories of core documents that relate  
9 directly to the principal issues in this case – whether the August 2009 Offering  
10 documents contained materially false and misleading statements or omissions. On  
11 November 30, 2011, Defendants served their written responses.

12 26. At the February 16, 2012 hearing on Defendants' motion to stay,  
13 STEC Defendants agreed to provide West Virginia Laborers with copies of all  
14 documents produced by the STEC Defendants (as well as transcripts of certain  
15 depositions) in the federal class action. Beginning on March 12, 2012, the STEC  
16 Defendants provided West Virginia Laborers with copies of these documents, as  
17 well as copies of more than thirty deposition transcripts from the federal class  
18 action. As of September 19, 2012, the STEC Defendants had produced more than  
19 652,516 pages of documents and 30 deposition transcripts to Plaintiff.

20 27. During the October 18, 2012 hearing on West Virginia Laborers'  
21 motion to lift the stay, the Court encouraged the parties to move forward with  
22 informal discovery. On October 23, 2012, counsel for West Virginia Laborers  
23 contacted counsel for Defendants to schedule a meet and confer conference to  
24 discuss specific discovery that West Virginia Laborers believed was essential to  
25 develop and protect the Securities Act claims and avoid prejudice. Specifically,  
26 West Virginia Laborers proposed to take nine depositions, including five party  
27 depositions – defendant Rajat Bahri and Rule 30(b)(6) depositions of the four  
28 Underwriter Defendants – witnesses that were not deposed in the federal class

1 action. Additionally, West Virginia Laborers requested that Defendants provide  
2 copies of certain documents produced in the federal class action, including  
3 documents from third parties, that had not yet been provided to West Virginia  
4 Laborers, in accordance with the Court's prior instructions in its February 17, 2012  
5 Minute Order.

6 28. On October 24, 2012, the parties met and conferred telephonically.  
7 Regarding the depositions proposed by West Virginia Laborers, counsel for the  
8 Defendants refused to produce the witnesses for depositions, but agreed to produce  
9 certain additional documents and information, and further explained that  
10 Defendants could not produce copies of certain documents produced by non-  
11 parties in the federal class action because those documents were expressly  
12 produced by the non-parties subject to a protective order. Defendants stated that  
13 they did not oppose any effort by West Virginia Laborers to contact the producing  
14 non-parties to obtain copies of the relevant documents or certifications from those  
15 parties allowing Defendants to produce the documents, consistent with the  
16 protective order.

17 29. On October 29, 2012, the Underwriter Defendants provided West  
18 Virginia Laborers with copies of documents produced by the Underwriter  
19 Defendants in the federal class action. On November 9, 2012, the STEC  
20 Defendants provided West Virginia Laborers copies of third-party subpoenas and  
21 contact information for twenty-five third parties that produced documents in the  
22 federal class action. In December 2012 and January 2013, West Virginia Laborers  
23 endeavored to obtain permission from those non-parties, and did receive  
24 permission from fourteen of the non-parties, to receive copies of documents they  
25 produced in the federal class action. On January 22, 2013, the STEC Defendants  
26 provided copies of such third party productions to West Virginia Laborers. West  
27 Virginia Laborers has received copies of document productions directly from two  
28 non-parties and continues to seek permission from the remaining non-parties.

1        30. Defendants have represented that they provided West Virginia  
2 Laborers with copies of all documents they produced in the federal class action.  
3 STEC Defendants have also represented that they provided West Virginia Laborers  
4 with copies of all documents they produced to the SEC in response to the SEC's  
5 investigative subpoenas.

6        31. In total, the STEC Defendants, the Underwriter Defendants, and  
7 certain third-parties produced more than 1.6 million pages of documents and 30  
8 deposition transcripts to Bernstein Litowitz, which were reviewed and analyzed by  
9 Bernstein Litowitz to assess the merits of and defenses to the Securities Act claims.  
10 Specifically, Bernstein Litowitz has received at least:

- 11            (a) Over 650,000 pages of documents from the STEC Defendants;
- 12            (b) Over 730,000 pages of documents from the Underwriter  
13            Defendants; and
- 14            (c) Over 240,000 pages of documents from non-parties B. Riley &  
15            Co., Cisco Systems, Inc., Hewlett-Packard Company, Hitachi  
16            Data Systems Corporation, Needham & Company, Pacific Crest  
17            Securities, Inc., PricewaterhouseCoopers, Reed Smith, Stifel  
18            Nicolaus & Company, Inc., ThinkEquity LLC, Thrivent Asset  
19            Management, Wedbush Securities, Inc., and Noble Financial,  
20            Inc.

21        32. In sum, West Virginia Laborers was diligently preparing its case for  
22 trial, including endeavoring to coordinate discovery with the federal class action in  
23 order to avoid duplicative document and deposition discovery, and retaining  
24 consultants and experts to prepare damages analyses for presentation at trial.

25        **G. This Court Denies New Jersey's Motion For Class Certification**

26        33. Bernstein Litowitz continued to protect the valuable Securities Act  
27 claims by moving, on behalf of West Virginia Laborers, to intervene when  
28 Successor Lead Counsel moved to certify a plaintiff class that included claims both



1 under the Exchange Act, which Lead Plaintiff has standing to maintain, and under  
2 the Securities Act, which this Court had previously ruled no representative plaintiff  
3 had standing to represent under the theory of Successor Lead Counsel's operative  
4 complaint. Bernstein Litowitz argued that the valuable Securities Act claims being  
5 prosecuted by West Virginia Laborers in state court should not be erroneously  
6 incorporated into any class that may be certified in this federal action, particularly  
7 where this Court had dismissed the Securities Act claims and determined that no  
8 named plaintiff in this federal action had standing to maintain the Securities Act  
9 claims. ECF No. 249, 257.

10 34. This Court agreed and denied Lead Plaintiff's initial class certification  
11 motion, finding that "the proposed Class Representatives are inadequate because  
12 they seek to certify a Class that includes individuals who may have claims under  
13 the Securities Act, but the Class Representatives do not have standing to bring  
14 those claims."<sup>4</sup> After Lead Plaintiff failed to identify any plaintiff with standing  
15 who was willing to litigate the case on behalf of the Securities Act claims as then  
16 alleged in this case, this Court then certified a class only "for purposes of asserting  
17 the Exchange Act claim."<sup>5</sup>

#### 18 **H. Settlement Approval Process**

19 35. Throughout the settlement approval process, Bernstein Litowitz  
20 continued zealously protecting the Securities Act claims, to ensure that a class  
21 representative with standing represents them, and to ensure that Securities Act  
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23 <sup>4</sup> ECF No. 279, p. 10. On June 14, 2012, the Ninth Circuit denied Lead Plaintiff's  
24 petition for permission to appeal this Court's order denying class certification. ECF  
25 No. 313. This Court's March 7, 2012 Order denied West Virginia Laborers'  
26 motion to intervene as moot in light of its denial of class certification. ECF No.  
27 279, at p. 21.

28 <sup>5</sup> ECF No. 314. On September 6, 2012, the Ninth Circuit denied Defendants'  
petition for permission to appeal this Court's order granting class certification for  
the Exchange Act claim. ECF No. 322.



1 claimants receive an actual, rather than illusory, premium for these “more  
2 valuable” claims. Despite Bernstein Litowitz being excluded from the settlement  
3 negotiations, its efforts were largely successful, and materially contributed to the  
4 recovery obtained.

5 36. Specifically, following West Virginia Laborers’ opposition to Lead  
6 Plaintiff’s initial purported “unopposed” motion for preliminary approval, the  
7 Court held that: (1) the proposed Securities Act class representative, Mark  
8 Ripperda (“Ripperda”), failed to satisfy the typicality requirement because he  
9 lacked standing to assert the Securities Act claims as alleged in the operative  
10 complaint; and (2) Ripperda failed to satisfy the adequacy requirement, both  
11 because he lacked standing, and because Lead Plaintiff did not satisfy the burden  
12 of showing that Ripperda and his counsel are able to prosecute the claims  
13 vigorously. This Court expressly noted its reliance on West Virginia Laborers’  
14 opposition:

15 As West Virginia Laborers points out in its opposition, Plaintiffs have  
16 not established Ripperda or his counsel’s adequacy to prosecute the  
17 Securities Act claims nor supplied any information regarding their  
18 efforts to negotiate the allocation of these claims from the net  
19 settlement fund. In fact, Ripperda and his counsel have been involved  
20 in this case only since August 2012; counsel attended one mediation  
21 session in which Ripperda was “available by telephone.”  
22 Furthermore, Ripperda did not play an active role during discovery  
23 and began his participation late in the settlement negotiation stage.  
24 Finally, Plaintiffs’ only basis for qualification of Ripperda’s counsel is  
25 that the Court previously found that Co-Lead Counsel was qualified  
26 and capable, and so “Ripperda’s counsel too are qualified and  
27 experienced.”

28 ECF No. 346, pp.12-13 (citations omitted).

1 37. Successor Lead Counsel thus filed an amended complaint to assert  
2 Securities Act claims (that it had previously elected not to reallege), and to adopt  
3 the “competition” claim and corrective disclosure previously alleged by Bernstein  
4 Litowitz.

5 38. Although this Court then granted preliminary approval over Bernstein  
6 Litowitz’s objection, this Court acknowledged the ambiguity revealed by Bernstein  
7 Litowitz as to whether the purported premium in the plan of allocation applied  
8 before or after the out-of-pocket loss cap is applied, and adopted the interpretation  
9 of the plan that ensures that the premium is actual, rather than illusory. ECF No.  
10 358, pp. 17-18 (explaining ambiguity in the Notice and the Finnerty declaration);  
11 ECF No. 361, p. 7 (adopting an interpretation that ensures the out-of-pocket loss  
12 cap is applied before the premium).

13 **II. THE APPLICATION FOR ATTORNEYS’ FEES AND EXPENSES**

14 39. Bernstein Litowitz is applying to this Court for an award of attorneys’  
15 fees only in the amount of its actually incurred lodestar, in a total amount of  
16 \$2,152,742.50, and for reimbursement of \$72,346.85 in litigation expenses.

17 **A. Application For Attorneys’ Fees**

18 40. For the extensive efforts on behalf of the Class, Bernstein Litowitz is  
19 applying for reimbursement for the total hours that it spent for the benefit of the  
20 Class. As set forth in Bernstein Litowitz’s accompanying Motion For Award Of  
21 Attorneys’ Fees And Reimbursement Of Litigation Expenses (“Fee Motion”), the  
22 lodestar is the appropriate starting point in determining a quantum meruit award,  
23 while the party seeking fees must also show that the total fees incurred were  
24 reasonable.

25 41. Bernstein Litowitz submits that its fee request is reasonable, and  
26 supported by its lodestar and the additional factors considered by courts in granting  
27 quantum meruit fee awards, including the nature of the litigation, the skill  
28 employed, the attention given, and the success or failure of the attorneys’ efforts.

42. As indicated in Table A below, the total number of hours expended on this litigation by my firm is 4,407.90 hours. The total lodestar for my firm is \$2,152,742.50.

**Table A: Lodestar Report Summary**

NAME	HOURS	HOURLY RATE (\$)	LODESTAR (\$)
<b>Partners:</b>			
Max Berger	16.50	\$975.00	\$16,087.50
Timothy DeLange	195.00	\$700.00	\$136,500.00
Avi Josefson	112.25	\$650.00	\$72,962.50
Blair A. Nicholas	346.50	\$800.00	\$277,200.00
Gerald Silk	89.50	\$800.00	\$71,600.00
<b>Senior Counsel:</b>			
Benjamin Galdston	527.25	\$600.00	\$316,350.00
Niki L. Mendoza	441.20	\$600.00	\$264,720.00
<b>Associates:</b>			
Michael Blatchley	70.75	\$440.00	\$31,130.00
Joseph Goodman	648.45	\$500.00	\$324,225.00
Paul Jonna	148.25	\$425.00	\$63,006.25
Takeo Kellar	258.75	\$475.00	\$122,906.25
Ann Lipton	17.00	\$490.00	\$8,330.00
<b>Law Clerk:</b>			
Reza Wrathall	96.25	\$325.00	\$31,281.25
<b>Staff Attorney:</b>			
Elaine White	16.00	\$390.00	\$6,240.00
<b>Paralegals:</b>			
Dena Bielasz	528.75	\$265.00	\$140,118.75
Jessica Cuccurullo	65.00	\$265.00	\$17,225.00
Kelly McDaniel	25.75	\$225.00	\$5,793.75
Amy Neil	22.25	\$265.00	\$5,896.25
<b>Case Analyst:</b>			
Sam Jones	165.75	\$245.00	\$40,608.75
<b>Investigators:</b>			
Amy Bitkower	169.50	\$465.00	\$78,817.50
Lisa C. Burr	17.00	\$265.00	\$4,505.00

NAME	HOURS	HOURLY RATE (\$)	LODESTAR (\$)
Jaclyn Chall	220.50	\$265.00	\$58,432.50
Joelle (Sfier) Landino	102.50	\$265.00	\$27,162.50
<b>Director of Investor Services:</b>			
Adam Weinschel	37.25	\$375.00	\$13,968.75
<b>Financial Resources Analyst:</b>			
Rochelle Moses	18.00	\$295.00	\$5,310.00
Sharon Safran	14.00	\$295.00	\$4,130.00
<b>Litigation Support:</b>			
Andy Alcindor	14.50	\$260.00	\$3,770.00
<b>Document Clerk:</b>			
Michael Andres	23.50	\$190.00	\$4,465.00
<b>TOTAL LODESTAR</b>	<b>4,407.90</b>		<b>\$2,152,742.50</b>

43. In addition, Bernstein Litowitz is submitting (*in camera* in order to preserve the attorney-client privilege and/or work product protection) its comprehensive time report detailing the work actually performed, in chronological order, including the timekeeper, description of work performed, time, rate, and lodestar for each task.

44. I maintained daily control and monitoring of all the work provided by lawyers on this case. While I personally devoted substantial time to this case, I have also utilized other experienced attorneys at my firm to undertake or work with me on particular tasks appropriate to their levels of expertise, skill and experience, and more junior attorneys and paralegals to work on matters more appropriate to their experience levels.

45. Bernstein Litowitz's hourly rates in this case are its regular 2011-2012 rates charged to clients who are billed by the firm on a monthly basis, and are based on qualifications and experience of each partner, senior counsel, associate, staff attorney, and paraprofessional. Courts within the Ninth Circuit have approved fee applications of Bernstein Litowitz in securities class actions with comparable hourly rates. Moreover, although to date Successor Lead Counsel Labaton

1 Sucharow has not publicly disclosed its lodestar or billing rates in this case,  
2 historically its billing rates have been consistent with those of Bernstein Litowitz.  
3 A survey of Labaton Sucharow's 2012 billing rates indicates it charged between  
4 \$725 to \$975 for partners (with an average rate of \$810), and between \$425 to  
5 \$650 for associates (with an average rate of \$528).

6 46. Bernstein Litowitz's rates are based on its annual survey of the market  
7 rates for practitioners in the field using available sources, including rates charged  
8 by law firms that regularly defend securities class actions. Bernstein Litowitz  
9 surveyed four other securities litigation specialist firms on the plaintiffs' side, and  
10 five securities litigation specialist firms that it regularly faces on the defense side.  
11 The information on rates for the plaintiffs' counsel firms was typically obtained  
12 from attorneys' fees applications in other securities class actions. The information  
13 on rates for the defense firms was typically obtained from bankruptcy court filings,  
14 in which approval to pay attorneys' fees was requested.

15 47. Bernstein Litowitz's rates in this case are also comparable to, or  
16 significantly less than, the known hourly rates charged by counsel that regularly  
17 represent defendants in securities class actions, including the law firm that  
18 represented the STEC defendants in this case, Latham & Watkins. For example,  
19 between August 2008 and August 2009 –i.e., 4-5 years ago – the rates for partners  
20 at Latham & Watkins ranged from \$600 to \$1,025 per hour (with a median rate of  
21 \$830) and the rates for its associates ranged from \$350 to \$705 per hour (with a  
22 median rate of \$490). Moreover, hourly rates at large defense firms have  
23 materially risen since the foregoing surveys were conducted.

24 **B. Application For Reimbursement Of Expenses**

25 48. The lodestar figures in Table A (and in the *in camera* submission) do  
26 not include charges for expense items. Expense items are billed separately. The  
27 expenses incurred by my firm in preserving and prosecuting the claims are  
28 reflected in the books and records of my firm. These books and records are

prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

49. As indicated in Table B below, the total expenses for my firm (paid expenses, as well as incurred but unpaid), for which reimbursement is sought, total \$72,346.85:

**Table B: Expense Report Summary**

CATEGORY	AMOUNT
Court Fees	\$1,712.07
Service of Process	\$1,856.11
Online Legal Research	\$37,744.72
Online Factual Research	\$7,746.45
Telephone	\$124.45
Postage & Express Mail	\$1,907.06
Internal Copying (\$0.25/page)	\$1,355.00
Out of Town Travel	\$3,951.06
Court Reporting & Transcripts	\$1,074.93
Experts	\$14,875.00
<b>TOTAL EXPENSES:</b>	<b>\$72,346.85</b>

50. In addition, Bernstein Litowitz is submitting *in camera* its detailed expense records.

51. From the beginning of the case, Bernstein Litowitz was aware that it might not recover any of its expenses, and, at the very least, would not recover anything until the claims were successfully resolved. Bernstein Litowitz also understood that, even assuming that the claims were ultimately successful, an award of expenses would not compensate it for the lost use of the funds advanced to prosecute the claims. Thus, Bernstein Litowitz was motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the claims.

52. The expenses for which reimbursement is sought are the type of expenses routinely charged to hourly paying clients, and were necessary and appropriate for the prosecution of these claims. These include charges for

1 payments to experts and consultants; court transcripts; costs incurred in out-of-  
2 town travel; charges for photocopying; telephone, postal and express mail charges;  
3 and similar case-related costs. Courts have typically found that such expenses are  
4 reimbursable from a fund recovered by counsel for the benefit of the class.

5 53. Included in the amount of expenses is \$14,875.00 paid to experts and  
6 consultants. This encompasses 20% of Bernstein Litowitz's total expenses.  
7 Bernstein Litowitz worked extensively with experts and consultants at the different  
8 stages of prosecuting the claims. The advice of experts was essential to the  
9 effective prosecution of these claims due to the complex issues of accounting  
10 misstatements, loss causation, and damages. Experts were utilized to prepare the  
11 initial consolidated complaint in this federal action, respond to Defendants' motion  
12 to dismiss, analyze documents, and to analyze potential recoveries.

13 54. Bernstein Litowitz also received more than 1.6 million pages of  
14 documents produced by the STEC Defendants, the Underwriter Defendants and  
15 certain third-parties. Included in the expense request is \$1,355.00 for  
16 reimbursement of Bernstein Litowitz's internal copying costs.

17 55. Bernstein Litowitz was required to travel in connection with  
18 prosecuting and settling the claims, and thus incurred the related costs of train  
19 tickets and meals. Included in the expense request is \$3,951.06 for Bernstein  
20 Litowitz's travel expenses necessarily incurred for the prosecution of the claims.

21 56. In connection with court proceedings in the two actions, Bernstein  
22 Litowitz also incurred \$1,074.93 for transcripts. The expenses also include the  
23 costs of on-line legal research in the amount of \$37,744.72, and on-line factual  
24 research in the amount of \$7,746.45. These are the charges for factual and legal  
25 research services such as Lexis-Nexis, Westlaw, Bloomberg, and Pacer. It is  
26 standard practice for attorneys to use these on-line services to assist them in  
27 researching legal and factual issues. *See In re Media Vision Tech. Sec. Litig.*, 913  
28 F. Supp. 1362, 1371 (N.D. Cal. 1996). Indeed, courts recognize that these tools



1 create efficiencies in litigation and, ultimately, save clients and the class money.  
2 *See, e.g., In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992). In  
3 approving expenses for computerized research, the court in *Gottlieb v. Wiles*  
4 underscored the time-saving attributes of computerized research as a reason  
5 reimbursement should be encouraged. 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd*  
6 *and remanded on other grounds sub nom. Gottlieb v. Barry*, 43 F.3d 474 (10th Cir.  
7 1994).

8 57. The other expenses are the types of expenses that are necessarily  
9 incurred in litigation and routinely charged to clients billed by the hour. These  
10 expenses include long distance telephone charges, postal and express mail  
11 expenses, and similar case-related costs. *See Thornberry v. Delta Air Lines, Inc.*,  
12 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated and remanded on other grounds*, 461  
13 U.S. 952 (1983); *see also Knight v. Red Door Salon*, 2009 WL 248367, at \*7 (N.D.  
14 Cal. Feb. 2, 2009); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048  
15 (N.D. Cal. 2007).

16 **C. The Reaction Of The Class To Date Supports**  
17 **Bernstein Litowitz's Fee And Expense Request**

18 58. The reaction of the class to a proposed fee and expense request is a  
19 relevant factor in approving fees and expenses. Here, West Virginia Laborers, the  
20 putative class representative in the related Securities Act Case, and who is a  
21 sophisticated institutional investor Class Member here, approves of Bernstein  
22 Litowitz's fee and expense request as fair and reasonable.

23 59. In addition, the Court-approved Notice sent to the Class informed the  
24 Class, inter alia, that: (i) Bernstein Litowitz would seek attorneys' fees in the  
25 amount of its lodestar actually incurred in preserving and pursuing both the  
26 Securities Act claims and the Exchange Act claims in this federal court action and  
27 the related state court action, in a total amount not to exceed \$2.6 million, and  
28 litigation expenses not to exceed \$80,000; (ii) Bernstein Litowitz's requested fee

1 would represent approximately 7.27% of the Settlement Fund; and (iii) in the event  
2 the Court awards the fees requested by Bernstein Litowitz, as well as the fee  
3 requested by Successor Lead Counsel, the total fees paid to counsel would not  
4 exceed 24.02% of the Settlement Fund.

5 60. While the deadline for Class Members to file objections, if any, does  
6 not expire until April 22, 2013, to date, no objection has been filed, either to the  
7 aggregate of the fee and expense requests, or to Bernstein Litowitz's fee and  
8 expense request as stated in the Notice, and Bernstein Litowitz has not been  
9 informed that any objections have been submitted but not filed.

10 I declare under penalty of perjury that the foregoing facts are true and  
11 correct and that this declaration was executed this 8th day of April, 2013.

12 /s/ Blair A. Nicholas

13 BLAIR A. NICHOLAS  
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